

## Department of Energy

904.7102

the foreign influences by isolation of the foreign interest.

(c) The types of plans that a contractor can propose are: measures which provide for physical or organizational separation of the facility or organizational component containing the classified information or special nuclear material; modification or termination of agreements with foreign interests; diversification or reduction of foreign source income; assignment of specific security duties and responsibilities to board members or special executive level committees; or any other actions to negate or reduce FOCI to acceptable levels. The plan of action may vary with the type of foreign interest involved, degree of ownership, and information involved so that each plan must be negotiated on a case by case basis. If the offeror(s) or contractor and the DOE cannot negotiate a plan of action that isolates the offeror(s) or contractor from FOCI satisfactory to the DOE, then the offeror(s) shall not be considered for contract award and affected existing contracts with a contractor shall be terminated.

[49 FR 11941, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994]

### Subpart 904.71—Prohibition on Contracting (National Security Program Contracts)

SOURCE: 58 FR 59684, Nov. 10, 1993, unless otherwise noted.

#### 904.7100 Scope of subpart.

This subpart implements section 836 of the Fiscal Year 1993 Defense Authorization Act (Pub. L. 102-484) which prohibits the award of a Department of Energy contract under the national security program to an entity controlled by a foreign government if it is necessary for that entity to be given access to information in a proscribed category of information in order to perform the contract.

[58 FR 59684, Nov. 10, 1993, as amended at 67 FR 14876, Mar. 28, 2002]

#### 904.7101 Definitions.

*Effectively owned or controlled* means that a foreign government or an entity controlled by a foreign government has

the power, either directly or indirectly, whether exercised or exercisable, to control or influence the election or appointment of the Offeror's officers, directors, partners, regents, trustees, or a majority of the Offeror's board of directors by any means, e.g., ownership, contract, or operation of law.

*Entity controlled by a foreign government* means any domestic or foreign organization or corporation that is effectively owned or controlled by a foreign government or any individual acting on behalf of a foreign government. See subpart 925.7 for a statement of the prohibition on certain foreign purchases.

*Foreign government* means any governing body organized and existing under the laws of any country other than the United States and its possessions and trust territories and any agent or instrumentality of that government.

*Proscribed information* means—

- (1) Top Secret information;
- (2) Communications Security (COMSEC) information, except classified keys used to operate secure telephone units (STU IIs);
- (3) Restricted Data, as defined in the Atomic Energy Act of 1954, as amended;
- (4) Special Access Program (SAP) information; or
- (5) Sensitive Compartmented Information (SCI).

[58 FR 59684, Nov. 10, 1993, as amended at 74 FR 36362, July 22, 2009]

#### 904.7102 Waiver by the Secretary.

(a) 10 U.S.C. 2536(b)(1)(A) allows the Secretary of Energy to waive the prohibition on the award of contracts set forth in 10 U.S.C. 2536(a) if the Secretary determines that a waiver is essential to the national security interests of the United States. Any request for a waiver regarding award of a contract or execution of a novation agreement shall address—

- (1) Identification of the proposed awardee and description of the control by a foreign government;
- (2) Description of the procurement and performance requirements;
- (3) Description of why a waiver is essential to the national security interests of the United States;